

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ROSE M. GRAY

Claimant

VS.

THE BOEING COMPANY

Respondent

AND

AETNA CASUALTY & SURETY COMPANY

Insurance Carrier

AND

KANSAS WORKERS COMPENSATION FUND

Docket No. 169,493

ORDER

The Kansas Workers Compensation Fund filed this Application requesting Appeals Board review of an Award entered by Administrative Law Judge Shannon S. Krysl on March 22, 1994. The Appeals Board heard oral argument by telephone conference.

APPEARANCES

The claimant appeared by and through her attorney, James B. Zongker of Wichita, Kansas. The respondent and its insurance carrier appeared by and through their attorney, Frederick L. Haag of Wichita, Kansas. The Kansas Workers Compensation Fund appeared by and through its attorney, John C. Nodgaard of Wichita, Kansas. There were no other appearances.

RECORD & STIPULATIONS

The Appeals Board has reviewed the record and adopted the stipulations listed in the Award, including the stipulation that the Kansas Workers Compensation Fund shall be liable for fifty percent (50%) of all compensation benefits and costs ordered paid in this matter.

ISSUES

The Kansas Workers Compensation Fund requested Appeals Board review of the sole issue relating to the nature and extent of claimant's disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments of the parties, the Appeals Board finds as follows:

The claimant claimed appropriate workers compensation benefits for a low back injury that allegedly occurred from April 1991 through April 1992. The second claim asserted by the claimant is for bilateral carpal tunnel syndrome with alleged dates of accident from April 1991 through May 1992. The Administrative Law Judge awarded permanent partial general disability benefits to the claimant based on work disability as a result of her low back injury in the amount of forty-one and one-half percent (41.5%) with a date of accident of April 1, 1991. She further ordered benefits based on a scheduled injury for the claimant's carpal tunnel claim in the amount of five and two-tenths percent (5.2%) for the loss of use of claimant's right arm only with a date of accident of March 17, 1992.

The first claim that the Appeals Board will address in this Order is the claimant's alleged bilateral carpal tunnel claim. The Administrative Law Judge found that the claimant was only entitled to scheduled injury with a loss of use of five and two-tenths percent (5.2%) of her right arm. She found that the claimant had not met her burden of proving a bilateral carpal tunnel injury which would have resulted in a whole body disability. See Stephenson v. Sugar Creek Packing, 250 Kan. 768, 830 P.2d 41 (1992). The Administrative Law Judge adopted the opinion of claimant's treating physician, J. Mark Melhorn, M.D., that the claimant had sustained a permanent functional impairment to her right arm but not to her left arm. Dr. Ernest R. Schlachter also testified, at the claimant's request, and he opined that the claimant had permanently injured both of her arms, resulting in a twelve percent (12%) permanent partial impairment of function to the body as a whole. The Appeals Board agrees with the finding of the Administrative Law Judge in regard to the claimant's alleged hand and arm injuries. The findings included in the Administrative Law Judge's Award that support this decision are herein adopted by the Appeals Board as its own, except for the finding of the Administrative Law Judge in reference to the date of accident. The Appeals Board finds that the appropriate date of accident for the claimant's right arm injury should be May 5, 1992, the day before Dr. Melhorn's surgery. The claimant testified that her hands and arms did not become symptomatic until she returned to her regular job in February 1992, after she had been placed in the work pool as a result of her first back injury which occurred in April 1991.

The Kansas Workers Compensation Fund (Fund) and the respondent both argue that the claimant's low back injury should be limited to a functional impairment rating as opined by Paul D. Lesko, M.D., claimant's treating physician. They contend that the respondent returned the claimant to a comparable wage job after her low back injury and thus the presumption against work disability should apply. See K.S.A. 1991 Supp. 44-510e.

Claimant first injured her low back in April 1991 while working as a sheet metal worker for the respondent. She had an onset of pain when she twisted, reaching for her tools. Claimant was first seen by Boeing Central Medical and then referred to Dr. Paul D. Lesko, an orthopedic surgeon, for further treatment. Dr. Lesko first saw the claimant on May 29, 1991, for low back pain and diagnosed claimant as having a low back strain. He

prescribed conservative treatment in the form of physical therapy, epidural steroid injections, ultrasound, exercises and anti-inflammatory medications. During that time claimant was assigned by the respondent to the work pool, performing work activities within Dr. Lesko's temporary restrictions. Dr. Lesko released the claimant on February 7, 1992, with a fifty (50) pound permanent lifting restriction and she returned to her sheet metal mechanic job.

In April 1992, claimant re-injured her low back when she slipped at work. She first saw Dr. Lesko for this incident on June 20, 1992. Again he prescribed conservative treatment which included physical therapy and trigger point injections. He also ordered an MRI that showed disc desiccation but no frank herniation. Claimant was followed by Dr. Lesko until September 30, 1992, when she was released with permanent restrictions of lifting limited to thirty-five to forty (35-40) pounds; no repetitive bending or twisting; and he recommended a job where she could sit part of the time and stand part of the time. He opined that as a result of her work-related low back injury, she had sustained a permanent functional impairment of three to five percent (3-5%) of the body as a whole. The Appeals Board finds that Dr. Lesko's average rating of four percent (4%) is the appropriate permanent functional impairment rating in regard to claimant's low back injury. On January 18, 1993, respondent placed the claimant in an accommodated position placing windows in airplanes. Claimant worked in that position until an economic layoff on June 22, 1993.

The Fund and the respondent argue that the presumption of no work disability applies in this case as the claimant returned to work at a comparable wage after her low back injury. Accordingly, they argue that the claimant is only entitled to her functional impairment. See K.S.A. 1991 Supp. 44-510e(a). The Appeals Board agrees that the presumption against work disability applies during the period of time the claimant was employed at a comparable wage by the respondent. However, the Appeals Board disagrees with the Fund and the respondent that the presumption still applies after she was laid off on June 22, 1993. At that time, claimant did not have the respondent's comparable wage job available to her and she was forced into the open labor market, through no fault of her own, with a permanent work-related low back disability.

Mr. Jerry Hardin, a human resource consultant, testified at the request of the claimant's attorney in reference to work disability. Mr. Hardin's testimony was uncontradicted. Based on Dr. Lesko's permanent restrictions that only related to the claimant's low back injury, Mr. Hardin opined that the claimant's ability to perform work in the open labor market had been reduced by fifty-five to sixty percent (55-60%). When Mr. Hardin utilized Dr. Schlachter's permanent restrictions which included both the claimant's arm injuries and low back injuries, he opined that claimant's ability to perform work in the open labor market had been reduced by seventy-five to eighty percent (75-80%). With respect to wage loss, Mr. Hardin opined that the claimant had a forty-two percent (42%) loss of comparable wage comparing a \$600 pre-injury wage to a \$350 post-injury wage.

The Administrative Law Judge awarded the claimant a forty-one and one-half percent (41.5%) work disability and found the date of accident to be April 1, 1991. The claimant's second low back injury of April 1, 1992 resulted in permanent functional impairment and more limiting restrictions than the injury of April 1, 1991. Accordingly, the Appeals Board finds that the appropriate date of accident for claimant's low back injury is April 1, 1992. The Appeals Board also finds that after the claimant was laid off on June 22, 1993, her ability to perform work in the open labor market was reduced by fifty-seven

and one-half percent (57.5%). This percentage is arrived at by averaging Mr. Hardin's loss of labor market opinion of fifty-five to sixty percent (55-60%) utilizing Dr. Lesko's permanent restrictions. In regard to claimant's ability to earn comparable wages, the Appeals Board finds the claimant's pre-injury average weekly wage of \$725.60, as found by the Administrative Law Judge, should be compared to a post-injury average weekly wage of \$350. Utilizing these weekly wage figures, the claimant's ability to earn comparable wages has been reduced by fifty-two percent (52%). Pursuant to the Hughes formula giving equal weight to each of these factors, the claimant is entitled to a fifty-five percent (55%) permanent partial general disability award based on work disability. Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011 (1990).

All other findings of the Administrative Law Judge in her Award of March 22, 1994, are incorporated herein and are made a part hereof as if specifically set forth in this Order to the extent that they are not inconsistent with the findings and conclusions expressed herein.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Shannon S. Krysl, dated March 22, 1994, is hereby modified and an award is entered as follows:

AN AWARD OF COMPENSATION IS HEREBY ENTERED IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Rose M. Gray, and against the respondent, The Boeing Company, and its insurance carrier, Aetna Casualty & Surety Company, and the Kansas Workers Compensation Fund, for a low back injury sustained on April 1, 1992, and for injury of the right arm with a date of accident of May 5, 1992.

Compensation for the low back injury sustained on April 1, 1992 shall be paid at the rate of \$16.95 per week for 63.86 weeks or \$1,082.43 for a 4% permanent partial general disability based on functional impairment from April 2, 1992 through June 22, 1993, the last day worked, followed by 351.14 weeks at the rate of \$266.07 or \$93,427.82 for a 55% permanent partial general disability based on work disability commencing June 23, 1993, making a total award of \$94,510.25 for the low back injury.

As of June 30, 1995, there is due and owing claimant 63.86 weeks for a 4% permanent partial general disability at the rate of \$16.95 per week or \$1,082.43 plus 105.43 weeks for a 55% permanent partial general disability at the rate of \$266.07 per week or \$28,051.76, for a total of \$29,134.19 which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$65,376.06 is to be paid for 245.71 weeks at the rate of \$266.07 per week, until fully paid or further order of the Director.

Compensation for the right arm injury of May 5, 1992, is to be paid at the rate of \$289 per week for 3.71 weeks of temporary total disability compensation equalling \$1,072.19, followed by 10.73 weeks permanent partial general disability at the rate of \$289 equalling \$3,100.97 for a 5.2% permanent partial scheduled injury, making a total award of \$4,173.16.

As of June 30, 1995, the award for the right arm injury in the amount of \$4,173.16 is due and owing claimant in one lump sum, less any amounts paid.

Claimant is entitled to unauthorized medical up to the statutory maximum.

Future medical benefits will be awarded only upon proper application to and approval by the Director of Workers Compensation.

Claimant's attorney fees are approved subject to the provisions of K.S.A. 44-536.

Per stipulation, all compensation benefits, medical expenses and costs incurred in this claim are to be assessed fifty percent (50%) against the respondent and fifty percent (50%) against the Kansas Workers Compensation Fund.

Fees necessary to defray the expenses of administration of the Workers Compensation Act are hereby assessed against the respondent and the Kansas Workers Compensation Fund to be paid direct as follows:

Court Reporting Service	
Transcript of Regular Hearing	\$76.00
Kelley, York & Associates, Ltd.	
Deposition of Continuation of Regular Hearing	286.87
Deposition of Paul D. Lesko, M.D.	224.75
Deposition of Rose M. Gray	145.50
Deposition of Jerry Hardin	275.70
Barber & Associates	
Deposition of Ernest R. Schlachter, M.D.	214.20
Don K. Smith & Associates	
Deposition of J. Mark Melhorn, M.D.	196.00

IT IS SO ORDERED.

Dated this ____ day of June 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James B. Zongker, Wichita, KS
Frederick L. Haag, Wichita, KS
John C. Nodgaard, Wichita, KS

Shannon S. Krysl, Administrative Law Judge
George Gomez, Director